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SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1955.

No. 914.

FERRIEL M. BARNETT,
Petitioner,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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STATEMENT.

The petition for certiorari is not accompanied by a certified transcript of the record, but references to certain pages of the typewritten transcript filed in the District Court appear in the petition for certiorari, and in the ap-

pendix thereto filed by petitioner. Therefore, in referring to the evidence, respondent will give the page numbers where that evidence appears in the typewritten transcript.

Petitioner, as plaintiff in the District Court, sued defendant (respondent here), seeking to recover damages under the Federal Employer's Liability Act, alleging that he was injured by reason of defendant's negligence in permitting the air brake hose and the steam pipe on each of two cars in defendant's railroad yard to remain uncoupled and in a position where steam was escaping from the steam pipe between those two cars at a time when the weather was below freezing; that as a direct result of such negligence, "Ice formed in and upon the couplers of said air hoses and wholly or partly as a result thereof, plaintiff was unable to make a secure coupling of said air hoses by reason of the existence of ice in and on such coupling, so that they burst apart, struck, and injured Plaintiff, as hereinafter stated" (Appendix p. 2).

Defendant admitted the employment of plaintiff as alleged, denied that it was negligent, and pleaded that plaintiff's injuries resulted solely from his own negligence (Appendix pp. 3-4).

Plaintiff testified that the steam and air hose connections between the two cars mentioned were left uncoupled, as stated by petitioner, that the weather was cold, and that by reason of condensation of escaping steam from the open steam line, a lump of ice larger than a man's fist formed on the head of the air hose coupler. He testified that he knocked the ice off the coupler with a hammer, and then coupled the air hose together. We cannot accept petitioner's statement that plaintiff "could not be sure that he removed all of the ice" (Petition, p. 6).

At the trial plaintiff testified that before he coupled the air hose together, ice was "piled up there, kind of mushroom-like" on the head of the coupling (T. 67). Then, on direct examination:

> "Q. Now, what did you do about the ice?"
>
> "A. Well, I took my hammer and knocked it off there. * * * I worked with my right hand and I just knocked it off and took the hammer, hit it like this, and shake them off and hook them together" (T. 69).

That he laid his lantern on the side of the car, and held the hammer in his right hand. Then:

> "Q. Now, did you take hold of that (coupling) when you hit, knocked the ice off of it, or not?"
>
> "A. Yes, sir" (T. 70).
>
> "Q. Now, you were here and hitting it, how many times would you hit it?"
>
> "A. I hit it about twice, I guess, just enough to knock the ice off of it" (T. 71).

On cross-examination plaintiff testified that it was his job to knock the ice off (T. 136); that "You have to knock it off to make a coupling if you got ice on" (T. 137); and that when he put the couplings together, "they went down and locked, just like they usually do, routine work, work every night on it. * * * they buckled and dropped down like that there, that is what we go by" (T. 138).

> "Q. But you knocked it off?"
>
> "A. Yes, sir."
>
> "Q. With your hammer?"
>
> "A. Yes" (T. 139).

That after he knocked the ice off and coupled the hose, he "just picked it up and hit it like that there and laced them together".

"Q. After you knocked the ice off with your hammer, you said you gave it a couple licks, whatever it was?"

"A. Yes, sir."

"Q. When you laced them together, like shown here, they went together all right?"

"A. I thought they did."

"Q. There wasn't anything you could notice to keep them from going together?"

"A. No, sir" (T. 140).

Plaintiff further testified that the couplers "would not go plumb down together if there was any ice in here", and that when he put them together he did not notice anything wrong with them; that there is an interlocking device consisting of a groove on one coupler head and a "lock washer" on the other; that the groove, or flange, is about a quarter-inch deep, and that the lock washer fits into it.

"Q. Haven't you put enough (air hose couplings) together you could tell that went in all right?"

"A. I thought it went in there."

"Q. If there had been anything in there, there had been any ice or a lump of coal or anything else in there that head could not have gone in there, could it?"

"A. No, not if it had any lump of coal in it, it could not go in there, could not go in there if it had any ice in there" (T. 143).

Plaintiff admitted that at the first trial he testified that there was ice "probably as thick as your fist on them air hose that accumulated there and I take my hammer and beaten it off", and then made the coupling, and then testified at the third trial that he beat the ice off the coupling before connecting it (T. 184-185). Finally, after further questioning about his testimony at the first and second trials, he was asked:

"Q. Now, I asked you this morning, and I will ask you again whether you knocked all that ice off of the coupling when you knocked it off with the hammer, did you knock it all off?"

"A. All off the head of it."

"Q. What?"

"A. Off the head of the coupling and coupled them together" (T. 195).

Respondent cannot accept petitioner's statement that when plaintiff knocked the ice off the coupler, he could not be sure he removed all of it (Petition, p. 6), and, in view of plaintiff's testimony that when he "laced" the air hose couplings together there was nothing he could notice which prevented a proper coupling and that a proper coupling could not be made "if it had any ice in there" (T. 143), we think petitioner should have stated that plaintiff so testified instead of saying merely, "There is also some testimony that a coupling could not be made if there was any foreign matter in the coupling unit" (Petition, p. 7).

As has been seen, plaintiff testified positively that the coupling could not be made if it had ice in it. And plaintiff's witness McCauley so testified on direct examination by plaintiff's counsel, as follows:

"Q. In other words, anything, whether it be metal that is in here, ice or anything else, would break your tie that holds your coupler together, would it not?"

"A. It would prevent it from coupling properly."

"Q. If there was any ice or anything down in there it will destroy your locking mechanism?"

"A. Yes, that is it" (T. 234-236).

The facts should also be made to more fully appear as to the reason why the air hose coupler referred to at pages 7 and 8 of the petition for certiorari was withdrawn from

the jury, and why the testimony there set out was stricken by the trial court.

All that appears in the petition is that petitioner examined plaintiff's witness McCauley concerning a piece of air hose and a coupling which he exhibited to the witness and to the jury; that "counsel for respondent cross-examined this witness about this particular locking mechanism. Then on the next day counsel for respondent moved that all of this testimony be stricken and it was ordered stricken by the Court (T. 303).

The facts are that on the first day of the trial plaintiff's counsel produced two pieces of air hose, each part being equipped with a "head" (T. 14), with a "lip" on one head and a "groove" on the other, which were identified as exactly like the air hose and couplings involved in the case, and were introduced in evidence with an explanation as to how the two pieces of hose were locked together by fitting the lip into the groove (T. 17). When those two pieces of air hose were put in evidence, plaintiff's counsel marked the lip and groove of the coupler with chalk (T. 16-17); and the witness McCauley put them together and explained to the jury that the locking of the coupler in such manner would prevent the heads from pulling apart on lateral movement (T. 17-19), and testified that if the coupler "was wore to the point that there was no tongue-and-groove left, or if the head of the hose is spread apart in some way, then it would pull apart" (T. 19).

Later, McCauley was recalled by plaintiff and a third and different piece of hose was produced and exhibited to the jury with one of the two pieces first used without explanation that it was a different hose. The third hose was not identified or formally introduced, and both the Court and defendant's counsel were ignorant of the fact

that it was not the same hose that had been introduced previously. The tongue and groove had been marked with chalk in the same manner as the hose that was originally introduced (T. 234-235). The head on the third piece of hose was the same kind of head as the one on the first piece. But the groove on the head of the third hose had been filled in with metal, which fact was unknown to the Court or to defendant's counsel, and which fact was not developed until the following day during a conference in the Court's chambers, and it was then developed only after extended discussion concerning the presence of the metal in the groove of the coupler head.

During the colloquy in the Court's chambers, plaintiff's counsel stated, with reference to the use of the third air hose, that he had McCauley examine it, "and explain to the jury the fact that this little tongue-and-groove arrangement had been destroyed, that was the first thing I did."

> "Mr. Ely (defendant's counsel): Do you mean when you first introduced the coupling?"
>
> "Mr. Fredrickson (plaintiff's counsel): I had the coupling there."
>
> "The Court: Before you introduced it, according to the statement?"
>
> "Mr. Fredrickson: Right."
>
> "Mr. Ely: Before he introduced it the first time?"
>
> "Mr. Fredrickson: Right. And it was after that that we had the demonstration, that is perfectly proper to do because it does demonstrate it better than any words or any testimony how a coupler would operate or work if your tongue or groove or flange or anything were destroyed, which the jury can believe did occur in this case."

"Mr. Ely: I don't see how they could and if there was such testimony at the time the coupler was first introduced I did not get it, and Mr. Voorhees (associate counsel), who sits here, says he did not get it. Is that right? I do not recall any such evidence as that. The first time I heard anything about a defect—"

"The Court: That would show up when Mr. McCauley first took the stand in the early part of his testimony?"

"Mr. Fredrickson: No, that came in, Your Honor, if you will recall, Your Honor—"

"Mr. Ely: That is why I am complaining about it."

"Mr. Fredrickson: It doesn't matter whether it came in one time or another."

"Mr. Ely: It makes a big difference."

"The Court: I understand your statement, I get the impression from your statement that you initially asked him all about this."

"Mr. Ely: When he first put him on the stand."

"Mr. Fredrickson: No, I started to and if you recall at that time objection was made that there was no foundation for such testimony * * *" (T. 291).

After further colloquy, defendant's counsel then stated that nothing was said about a defect until McCauley was brought back to the witness stand the second time, and the colloquy continued:

"Mr. Fredrickson: I agree."

"Mr. Ely: At the end of plaintiff's case."

"The Court: I understand. What I am trying to do is to ascertain what happened, so I can know."

"Mr. Fredrickson: Where Mr. McCauley identified this air hose with the weld in it would be right at the close of plaintiff's case."

"Mr. Ely: And that is the first time I knew that it had a weld in it."

"The Court: That was after the demonstration was made."

"Mr. Ely: After it had been used for a number of demonstrations."

"Mr. Fredrickson: No."

"Mr. Ely: No, I don't mean—"

"The Court: Well, when McCauley was on the first time, didn't he make some demonstration?"

"Mr. Fredrickson: Your Honor, I have three air hose out there. These two are in the ordinary usual condition. Mr. McCauley identified them. There was a demonstration as to these. I started inquiring, laying a foundation preparatory to introducing my third one."

"Mr. Ely: I didn't know you had three. I thought you just had two."

"Mr. Fredrickson: Well, whether you knew it or not I started to lay that foundation. We had the conference here and you said after our discussion as I understood it that you believed until there was further evidence introduced, further foundation laid it would be improper to go into it at that time. * * * So, I did not go into it until I laid further foundation. Then I recalled Mr. McCauley and on my recall of him I then introduced in evidence the third air hose, and at that time was when we had the demonstration."

"Mr. Ely: I thought you did not introduce it in evidence. You picked it up and showed it to McCauley" (T. 292-294).

The case was then re-opened, the trial resumed, and defendant called Mr. Fredrickson, plaintiff's counsel, as a witness.

Mr. Fredrickson testified that when he first called Mr. McCauley to the stand he made use of two certain couplers or two pieces of air hose in making certain demonstrations, and that when he called McCauley back to the stand, he produced one of those two pieces originally used,

and a third, and different, piece of air hose, which he used for another demonstration; that the third piece of hose had not previously been used in the case (T. 295); and that when he produced the third hose, he did not announce that it was a different one (T. 296).

Mr. Fredrickson then testified that the flange on the lip of the third air hose had been filled in with metal at his direction (T. 296-297); that before using it he did not advise the Court or opposing counsel that it was a different air hose from the one he had been using (T. 298); that he picked it up from the floor under the table, and that "I did not make any statement to you or His Honor, or to Mr. McCauley or to the jury, or anyone, that I have a third air hose here" (T. 299); that in having the groove of one connection filled with metal, "I acted upon my own suggestion. * * * I had two air hoses and I played with them, worked them, saw how they worked, and I figured that just as a simple matter of the way things operate, anything that would destroy this groove here—"

"Mr. Ely: I object to exhibiting this air hose to the jury."

"The Court: Sustained."

"Mr. Ely: It is not shown to be a similar condition or in similar condition as the air hose involved in this lawsuit."

"A. (By Mr. Fredrickson): Well, we had agreed originally with Mr. McCauley, Your Honor, that these were similar."

"Mr. Ely: Not that one."

"Mr. Fredrickson: This one."

"Mr. Ely: Not that one there."

"Mr. Fredrickson: That is not the one I have in my hand. I determined from putting these together and taking them apart myself what kept these hose from

> sliding in this movement or this direction was your groove here, and your groove that is in there, and that anything that would destroy that groove, take it out of there, is going to destroy your locking mechanism in here, and having concluded that, I then thought, in order to explain it or show it adequately to the jury that it would be advisable to have a weld placed in one of them if I could get a weld in there" (T. 300-301).

Plaintiff's counsel then explained how he had the weld placed in the air hose coupler in order that he might use it for demonstration purposes (T. 302-303), and the Court sustained the defendant's motion to withdraw the welded hose from evidence and instructed the jury to disregard it (T. 303).

ARGUMENT.

I.

Petitioner contends that the judgment of the Court of Appeals should be reversed because the evidence given at the trial is conflicting and would support different inferences. He fails to point out any reasonable inference in his favor that could be drawn from the evidence, and we submit that no such inference is possible under the evidence.

Petitioner argues, at page 14 of his brief, that the jury could have found respondent negligent in failing to provide him with adequate tools to remove ice from the inside of the air hose coupler. Such argument cannot be sustained because, in the first place, as stated by the Court of Appeals:

> "There was no evidence whatever that there was any ice on the interior of this coupler and no testimony from which a jury could reasonably infer that the hose burst or came apart because of the presence of ice in the interior of the coupler" (Appendix 24).

Secondly, such contention cannot be sustained because there was no pleading to justify the submission of such an issue to the jury, and there was no evidence that the tools with which petitioner was provided (the hammer and the lantern) were inadequate. It will be remembered that plaintiff testified at the trial that he did knock the ice off the coupler with the hammer; that it was his job to do so; that he went about that job in the usual manner; and that the ice came off (T. 69-71, 139-140, 195). Plaintiff did not complain at the trial that the hammer was an in-

adequate tool and cannot now contend that it was, or that there was any evidence from which the jury could have so found.

Petitioner complains the evidence was conflicting, but does not point out wherein it conflicts, and we are unable to discover any conflict except in the testimony of plaintiff, and the contradictory claims and statements that he made, which have been heretofore referred to.

To support his first point petitioner relies upon three decisions of this Court. As we read and interpret those cases, all of them rule against petitioner's contention. We shall consider them briefly.

Lavender v. Kurn, 327 U. S. 645, 653, recognizes that when there is a complete absence of probative facts to support a plaintiff's case, he cannot recover. True, the Court in the Lavender case ruled that "whenever facts are in dispute, or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most **reasonable** inference". But that case does not hold that the jury may indulge in an inference that is without an evidentiary basis. As stated in the opinion of the Court of Appeals in this case, where an inference in favor of plaintiff "could be based only upon conjecture, possibility, speculation or guess (Appendix 24) * * * it cannot be said that there is substantial evidence sustaining plaintiff's contention, and, hence, as a matter of law plaintiff was not entitled to recover" (Appendix 24-25). To like effect, **Wilkerson v. McCarthy,** 336 U. S. 53, 61, holds that where the evidence will not rationally support a verdict for the plaintiff, it is the duty of the trial judge to enter a verdict for defendant, and that "he fails in his

duty to take a case from a jury when the evidence would not warrant a verdict by it".

Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29, declares:

> "In order to recover under the Federal Employer's Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 54, 87 L. Ed. 610, 617, 63 S. Ct. 444, 143 A. L. R. 967. Petitioner was required to present probative facts from which the negligence and causal relation could reasonably be inferred."

It has been seen that in the amended complaint on which this case was tried in the District Court, the only negligence alleged was that defendant left two passenger cars uncoupled in its railroad yard during freezing weather, with steam escaping from a steam pipe between those cars, which resulted in the formation of ice "**in** and upon" the couplers of the air hoses between said cars, and that because of the presence of such ice "**in** and on such coupling, * * * they burst apart" (Appendix 2).

As has been seen, and as was stated by the Court of Appeals, there was no evidence whatever that ice was at any time on the **interior** of the coupler, and no testimony from which a jury could reasonably infer that the hose came apart because of the presence of ice on the interior of the coupler (Appendix 24). Therefore, there was no evidence from which a reasonable inference could be drawn in favor of plaintiff's contention, and such is the law as declared by this Court in Lavender v. Kurn, Wilkerson v. McCarthy, and Tennant v. Peoria & Pekin Union Ry. Co.

II.

Petitioner's second point is that the Court of Appeals injected contributory negligence as a defense in the case, in support of which contention petitioner argues that "there was substantial evidence from which a jury could infer that ice remained in the coupler, i. e. inside". But, no such evidence is to be found in petitioner's brief or in the appendix. Nor is there any such evidence in the record. Therefore, we consider that this contention of petitioner is sufficiently answered by the statement of the Court of Appeals that "**there was no evidence whatever that there was any ice on the interior of the coupler**" (Appendix 24).

Petitioner again relies upon Tiller v. Atlantic Coast Line Ry. Co., 318 U. S. 54, to support his claim that contributory negligence will not defeat a plaintiff's right to recover in a case under the Federal Employer's Liability Act. That is true, and that is the law, but it is also the law, as announced in the Tiller Case that in order to make a case under the Act, a plaintiff must prove that the defendant was negligent "and that such negligence was the proximate cause" of his injuries. There was an utter failure in this case to prove that defendant was negligent as charged, and, therefore, the Tiller case affords no authority for petitioner's contention.

Furthermore, the Court of Appeals did not "inject contributory negligence as a defense in this case", as claimed by petitioner. What the Court of Appeals said was:

> "While **contributory negligence is not a defense** to an action brought under the Federal Employer's Liability Act, yet where the negligence is that of the employee alone, there can be no recovery" (Appendix 26).

That is the only sentence in the opinion of the Court of Appeals where the words "contributory negligence"

appear, and nothing is said in the opinion to the effect that contributor negligence might be relied upon as a defense in a case nder the Federal Employer's Liability Act. Therefore, respondent submits that petitioner has evidently misiterpreted the opinion of the Court of Appeals, and that there is no basis for his contention that contributory negli ence was injected in the case.

III.

The Cou t did not err in withdrawing from consideration of the ary the third piece of air hose, which was never formally in roduced and was not identified as a different hose from ne of the two that had been previously put in evidence.

At page 1 of petitioner's brief, under "Summary Of Argument" petitioner cites two cases, **Teal v. Bilby,** 123 U. S. 572, nd **Wilkinson v. Livingston,** 45 F. 2d 464. No further ref ence is made to those, and petitioner does not state wher in he considers that they support his contention.

The facts with reference to the use of the third hose do not appear in petitioner's statement, nor in the excerpts of the testi ony in the appendix which he has filed (Appendix 12-5).

It does ot even appear in petitioner's statement, or brief, or in he appendix to his petition, that three pieces of air hose were used. At page 6 of his statement petitioner says, "Two exhibits were offered of a coupling such as the one n use on the occasion in question", and from petitioner's tatement and from his argument it would appear that o y two pieces of air hose were produced at the trial. In th argument petitioner says, "the **second** coupler offered had a metal weld to simulate the presence of ice" (p. 15). N reference is made to a third coupler.

That is why respondent considered it necessary to state the facts more fully, so that this Court might be advised that a third piece of hose, which had been previously prepared by filling the groove of the coupler with metal, so that it would not couple, was used for demonstration purposes at the trial.

At page 15 of his argument petitioner mistakenly says, "Counsel for the respondent knew that petitioner's counsel, Mr. Fredrickson, was using a different coupler from the one first used in evidence". That is not true; it clearly appears from the record that respondent's counsel **did not know** it was a different coupler, and was not advised that it was a different one until after an extended colloquy in the Court's chambers (T. 291-294).

As stated by the Court of Appeals:

> **"it is perfectly manifest on the record that neither the court nor opposing counsel knew that this so-called exhibit had not been previously admitted in evidence"** (Appendix 20).

As was stated in the opinion of the Court of Appeals:

> "The locking mechanism in the third piece of hose had been so altered by inserting a foreign piece of metal therein as to render it ineffective and wholly unlike the actual condition of a normal locking mechanism" (Appendix 21-22).

In **Specht v. Howard**, 33 U. S. 564, 16 Wallace 564, 21 L. Ed. 348, this Court held that evidence improperly admitted may thereafter be stricken out by the Court. In 32 C. J. S. 457, sec. 607, it is stated that "In order that an article may be introduced it must be satisfactorily identified and it must also be shown to the satisfaction of the Court that

no substantial change in the article exhibited as to render the evidence misleading has taken place".

It is too clear for argument that the third piece of hose was improperly exhibited to the jury, that the use of it for demonstration purposes was confusing and misleading, and we submit that the Court did not err in withdrawing that hose from the evidence and instructing the jury to disregard it and the demonstrations that had been made with it.

IV.

Petitioner's contention that there is a conflict between the opinion which is the subject of his petition to this Court, and the prior opinion of the Court of Appeals cannot be entertained. Both opinions are set out in the appendix to the petition.

The original complaint has been presented to this Court, but the negligence charged in the original complaint is stated in the first opinion (at page 29 of the appendix). It there appears that plaintiff originally charged that defendant was guilty of negligence (1) in requiring him to work between cars so situated that the air hose coupling was likely to burst apart when the air pressure was turned on; (2) in assuring him that the place he was working was safe, when it was not safe; (3) in failing to provide means for releasing the air pressure in the coupling while he was working near it; (4) in failing to furnish sufficient personnel safely to perform the duties required of the plaintiff; (5) in failing to instruct him as to how to perform his duties safely; (6) in applying excessive and dangerous air pressure to the coupling which burst apart; (7) in failing to provide adequate means to inspect the equipment and to discover and replace defective equipment; and

(8) in failing to guard against the likelihood of an internal explosion in the air hose.

Further on in that opinion (at pages 30 and 31 of the appendix), the Court of Appeals relates the claim then made by plaintiff as to what occurred at the time of his injury, and as to what caused the air hose to separate, to-wit, that while plaintiff was in between two cars, attempting to stop a leak in the steam line by tapping on it with his hammer, the rear car suddenly moved about five inches and pulled the air hose coupling apart. There was no such claim at the third trial, no testimony to that effect, and no such allegation in the amended complaint.

By reference to the opinion which is the subject of plaintiff's petition for a writ of certiorari, it will be seen that the third trial was had on an amended complaint, which is the complaint set out at pages 1 to 3 of the appendix. At page 17 of the appendix the Court of Appeals says:

> "This complaint was an amended and substituted complaint in that it did not by reference or otherwise embody the allegations of the complaint as originally filed."

In other words, before the third trial plaintiff changed his complaint, and proceeded upon an entirely different theory than at the previous trial. Under such circumstances, respondent submits that there could be no conflict between the two opinions, because a different case was presented on the second appeal than on the first.

Respondent respectfully submits that the evidence does not justify submission of any of the five questions which are presented on page 4 of petitioner's brief; that petitioner has shown no reason why a writ of certiorari

should be granted; that no such reason appears in the record; and that the petition should be denied.

Respectfully submitted,

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